IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 540

JULIA ROSARDO et. al.
Petitioners

v.

GEORGE K. WYMAN et. al.
Respondents

~~MOTION OF STATE OF INDIANA FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND~~ BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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The State of Indiana, by Theodore L. Sendak, Attorney General of Indiana, and Robert A. Zaban, Deputy Attorney General, hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. Consent of the parties to this case is not required by virtue of Rule 42, Paragraph 4, of this Court.

The interest of the State of Indiana in this case arises from the fact that it is a party to a case presently pending in the United States District Court, Northern District of Indiana, Fort Wayne Division, in which one of the issues is identical and before both courts, namely the interpretation of 42 U.S.C. § 602(a)(23) with respect to states

participating in the AFDC program. *Wynn v. Indiana State Department of Public Welfare et. al.*, Civil Action File No. 69 F 76.

It is believed the brief which *amicus curiae* is requesting to file will contain a more complete argument concerning constitutional and other considerations in construing 42 U.S.C. § 602(a)(23) in light of the financial realities of Federal-State participation as affected by 42 U.S.C. § 603(a)(1).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of November, 1969, copies of this motion and brief were sent from Indianapolis, Indiana, via United States Mail, Air Mail, postage prepaid at Indianapolis, Indiana, to the following persons:

1. Miss Amy Juviler
   Assistant Attorney General of New York
   80 Centre Street, New York, New York 10013
   (Attorney for Respondent)
2. Mr. Lee A. Albert
   Columbia Center
   401 West 117th Street
   New York, New York 10027
   (Attorney for Petitioners)

3. The Solicitor General
Department of Justice
Washington, D. C. 20530

4. The Secretary of Health, Education and Welfare
Department of Health, Education and Welfare
Washington, D. C.

I further certify that all parties required to be served have been served.

THEODORE L. SENDAK
Attorney General of Indiana

ROBERT A. ZABAN
Deputy Attorney General

BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT

SUMMARY OF ARGUMENT

The purpose of the AFDC provisions of the Social Security Act is to provide the AFDC category of public welfare recipients with benefits through a statutory scheme by which federal and state funds are matched in certain proportions and by which the federal and state governments participate financially. Any amendment to the AFDC provisions of the Social Security Act which is deemed to increase benefits without federal financial participation is an infringement upon the police powers of the states and an attempt to preempt the states in matters relating to public welfare. Congress did not have these intentions when it enacted the clause which is now 42 U.S.C. § 602(a)(23). Therefore, Congress intended that this clause only apply to those states whose AFDC benefits are below the federal participation maximum as found in 42 U.S.C. § 602(a)(23).

ARGUMENT

Under the Tenth Amendment of the Constitution of the United States "All powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively, or to the people."

Public Welfare is within the police powers of a state as conferred by the Tenth Amendment. The states as sovereigns have power to contract with other sovereigns as long as the incidents of their sovereignty are not waived. By virtue of the Social Security Act of 1935 and the corresponding legislation of each state, the states and the Federal government can enter into agreements whereby the states can receive federal funds for Aid And Services To Fami-

lies With Dependent Children, hereafter termed AFDC, on a matching fund or participation basis. The matching fund formula is found in 42 U.S.C. § 603(a)(1). Of the average monthly benefit payment per recipient, the Federal government will pay $15 of the first $18 plus half of the difference between $18 and $32. The federal government will neither participate nor match funds to the extent that average monthly benefits per recipient exceed $32. In other words all benefits above $32 per month per recipient are out of the ambit of state-federal matching fund participation and are, therefore, *out* of the realm of the AFDC provision of the Social Security Act of which 42 U.S.C. § 602(a)(23) is a recent amendment. There is nothing in the AFDC provision of the Social Security Act of 1935 as amended or in any part of the act by which it is intended that Congress preempt the states in public welfare matters. This is certainly logical since the Tenth Amendment precludes such preemption.

It is hereby submitted that any attempt by Congress to coerce the states to provide welfare payments beyond the amounts by which the federal government will participate is certainly not only outside of the ambit of the Social Security Act as amended but also an infringement upon state sovereignty contrary to the Tenth Amendment and an attempt to preempt the states in public welfare matters. It must also be pointed out that the $32 per recipient per month maximum participation level, amounting to $22 per recipient per month in actual federal funds received via the formula in 42 U.S.C. § 603(a)(1), has not changed since 1958, i.e., for eleven years.

It may be argued that if the states do not like the present state-federal financial arrangement, they can drop out of the plan, and then they would not be plagued by such undesirable terms. This is true, but the welfare re-

cipients around this nation will derive little benefit from such action.

42 U.S.C. § 602(a)(23) can be interpreted in such a way as to be not only inequitable but also as to raise some serious constitutional questions. However, the State of Indiana does not necessarily challenge the constitutionality of 42 U.S.C. § 602(a)(23). Rather, it is asserted that if a law has two interpretations, one which renders it constitutional and one which renders it unconstitutional, the constitutional interpretation will prevail before this Court.

In order to give 42 U.S.C. § 602(a)(23) a constitutional interpretation it must apply only to states whose AFDC benefits are below the maximum amounts per recipient per month by which the Federal government will participate in the state-federal plan. It is not only the most constitutional and rational interpretation, but it is also the most equitable interpretation.

It is further asserted that if 42 U.S.C. § 602(a)(23) were meant to have the broad, sweeping effect which would make it applicable to all states sharing AFDC revenues then the maximum participation amounts under 42 U.S.C. § 603(a)(1) would also have been raised so that this clause would be in conformity with the federal participation purposes of the AFDC provision, especially since such maximums have not been raised in eleven years as heretofore pointed out.

By some very recent decisions by this Court in two AFDC cases which are widely cited as authority for the rights of AFDC recipients or those allegedly entitled thereof, *King v. Smith*, 392 U.S. 309, 88 S. Ct. 2128, 20 L. Ed. 2d 1118 (1968), and *Sharpiro v. Thompson*, — U.S. —, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969), this Court has specifically recognized that states may legitimately control welfare benefit payments. These cases, although decided before July 1, 1969, when 42 U.S.C. § 602(a)(23) went into effect, were

nevertheless decided *after* January 2, 1968, when the President signed the bill containing the amendment now known as 42 U.S.C. § 602(a)(23). Therefore, this clause could not have the broad, sweeping effect as contended by some nor could it be deemed to be applicable to all participating states.

Another clue shedding light upon which states 42 U.S.C. § 602(a)(23) has application can be seen in President Nixon's proposed welfare overhaul to assure a minimum of $1,600 for a family of four. This amounts to $25 per recipient per month. The first year extra welfare cost is estimated to be $4.4 billion. Presently there are House hearings under way on the bill with this provision. If such a bill is needed to overhaul our welfare system, and if its extra cost is so great, it would seem that 42 U.S.C. § 602(a)(23) was intended for states whose AFDC payments do not insure a family of four recipients a minimum income of $1,600 per year.

It must be brought to the attention of the Court that in the year ending June 30, 1969, the State of Indiana experienced an increase of 25 per cent in the number of AFDC recipients. With the state's tax base already depleted by federal taxes and the taxes necessary for state and local government to survive, it would be a burden of major proportions for the states to increase their welfare burden even more by complying with the proposed broad, sweeping interpretation of 42 U.S.C. § 602(a)(23) which some ascribe to it, unless the limits of federal funds participation as found in 42 U.S.C. § 603(a)(1) are substantially raised. It is difficult to believe that Congress meant to put some of the states in such difficult financial straights by ascribing a broad, sweeping affect to 42 U.S.C. § 602(a)(23).

It is further submitted that if 42 U.S.C. § 602(a)(23) were intended to apply to all states which share in federal AFDC funds, it is rather difficult to believe that it would

have been enacted as a mere clause in a very complex, multi-faceted Act, especially when its enactment raises the conflicts, questions, and issues brought forth in this brief and in all the pleadings, briefs, and judicial decisions in conflict with each other from the beginning of the litigation in this matter up to the present time.

CONCLUSION

The clause as found in 42 U.S.C. § 602(a)(23) was intended to apply only to those states in which the average monthly AFDC benefit payment per recipient is $32 or less.

Respectfully submitted,

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